STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 19, 2006
v	No. 262109 Wayne Circuit Court
CLADIUS PHILLIPS, Defendant-Appellant.	LC No. 04-012643-01

Before: Murray, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of third-degree criminal sexual conduct (CSC III), MCL 750.520(d)(1)(a) (sexual penetration with a person at least 13 but under 16 years of age), fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(a) (sexual contact with a person at least 13 but under 16 years of age), and accosting a child for immoral purposes, MCL 750.145a. Defendant was sentenced as a second habitual offender, MCL 769.10, to serve 8 to 15 years' imprisonment for both CSC III convictions, two to four years' imprisonment for the CSC IV conviction, and one to two years' imprisonment for the accosting a child for immoral purposes conviction. We affirm.

On appeal, defendant argues that he is entitled to retrial because the prosecution gave late notice, without showing good cause, of its intent to present evidence of other sexual acts with one of the victims. We disagree. We review a trial court's decision to admit evidence pursuant to MRE 404(b) for abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Generally, evidence is admissible if it is relevant and inadmissible if it is not. MRE 402; *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002). Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence. MRE 401; *Taylor, supra* at 521.

For evidence of prior acts to be admissible under MRE 404(b), it must satisfy three requirements: (1) the evidence must be offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (2) the evidence must be relevant to an issue or fact of consequence at trial, and (3) the evidence must be sufficiently probative to outweigh the danger of unfair prejudice, pursuant to MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). Moreover, the prosecution is generally required to provide defendant with reasonable notice of its intent to present evidence of prior bad acts in advance of

trial or during trial by showing good cause. MRE 404(b)(2); *People v Hawkins*, 245 Mich App 439, 453; 628 NW2d 105 (2001).

In the instant case, the Felony Information indicates that defendant was charged with only two counts of CSC III – the first pertaining to one instance of intercourse with the first victim and the second pertaining to one instance of cunnilingus with the first victim. Despite the fact that defendant was only charged with one instance of cunnilingus, the first victim claimed that defendant engaged in cunnilingus with her on five separate occasions. Given that the dates of all five acts of cunnilingus occurred within the time frame provided in the felony information, the prosecution's notice did not serve the purpose of warning defendant of its intent to present evidence of prior acts of uncharged misconduct as required by MRE 404(b)(2). Rather, because the jury could have seen each act of cunnilingus as the actus reus of the crime charged, the presentation of this evidence did not even implicate MRE 404(b). *VanderVliet*, *supra* at 95. Thus, there was no violation of MRE 404(b)(2).

Further, the prosecutor was not required to provide notice because the additional acts constituted the res gestae of the offense. The res gestae exception to MRE 404(b) allows the admission of other bad acts if they are connected to the charged crime in such a way that their admission is required to give the jury the "complete story." *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996), citing *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). Under this exception, "evidence of prior 'bad acts' is admissible where those acts are 'so blended or connected with the (charged offense) that proof of one incidentally involves the other or explains the circumstances of the crime.'" *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983), quoting *Delgado*, *supra* at 83. Here, the first victim noted that sometime in September 2003, defendant engaged in cunnilingus and intercourse with her in exchange for $100. She further explained that on four other occasions before she turned 16, she permitted defendant to engage in cunnilingus with her in exchange for money, marijuana, and a coat. Because each of defendant's acts is incidentally connected with one another, they fall within the res gestae exception to MRE 404(b). Therefore, no notice was required.

Next, defendant argues that he was denied a fair trial due to the trial court's failure to instruct the jury regarding evidence presented pursuant to MRE 404(b) and defense counsel's failure to raise this issue. We disagree. Generally, a defendant must object below to an instructional issue to preserve it for appeal. MCR 2.516(C); *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). However, a defense counsel's express approval of a jury instruction, as opposed to a mere failure to object, constitutes a "waiver that *extinguishes* any error" thereby precluding appellate review. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000) (emphasis in original). Here, although the trial court informed defense counsel that he could request a limiting instruction and defense counsel indicated that he would do so, defense counsel never requested such an instruction. Further, because defense counsel not only failed to object to the jury instructions, but also expressly approved them and declined to add anything to them when given an opportunity to do so, this issue has been waived and this Court need not review it.

Regarding defendant's ineffective assistance of counsel argument, because defendant failed to preserve this issue, we review for plain error and limit our review to mistakes apparent on the existing record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004); People *v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). The United States and Michigan

Constitutions guarantee a defendant the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. To establish ineffective assistance of counsel, "a defendant must show that counsel's performance was below an objective standard of reasonableness . . . and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Moreover, this Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Matuszak*, *supra* at 58.

The trial court was not required to give instructions concerning prior bad acts because MRE 404(b) was inapplicable. Therefore, any request for a limiting instruction by defense counsel would have been futile. Given that defense counsel "is not required to make a meritless motion or a futile objection," *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003), it was objectively reasonable for defense counsel not to request a limiting instruction or object to the instructions given. *Effinger*, *supra* at 69. Moreover, because the instructions were proper, any objection could not have changed the outcome of the proceedings. *Id*.

Finally, defendant asserts that the prosecution made improper arguments during closing argument denying him a fair trial. We disagree. We review unpreserved issues of prosecutorial misconduct for plain error. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). To avoid forfeiture, defendant must show that there was plain error that affected his substantial rights, i.e. that the error was outcome determinative. *Carines*, *supra* at 763-764. If a curative instruction could have alleviated any prejudicial effect, there is no reversible error. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

Prosecutorial misconduct occurs if a defendant is denied a fair trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). In evaluating issues of prosecutorial misconduct, this Court must examine the prosecutor's remarks in context and consider them in light of defense counsel's arguments. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

Defendant first claims that the prosecutor made two improper civic duty arguments. First, the prosecutor told the jury to "send [defendant] a message with your verdict, that his opportunistic, selfish, and perverted ways must be stopped and I want you to find him guilty as charged." Second, the prosecutor asked the jury to "affirm" the victims. Regarding these statements, a prosecutor may not urge a jury to convict a defendant as part of their civic duty because this argument injects issues broader than defendant's guilt or innocence of the charges and encourages jurors to suspend their own independent judgment. *Bahoda*, *supra* at 282; *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003).

The prosecutor's plea to "send [defendant] a message with your verdict" is arguably improper because it injected a broader issue into the trial than the conduct for which defendant was charged. However, any prejudicial effect could have been cured by a timely objection (which defendant failed to do) and instruction. *Rodriguez*, *supra* at 30. Further, in light of the victims' incriminating testimony, defendant has not demonstrated that a miscarriage of justice would result from the prosecutor's statement if his convictions were not overturned. *Id*.

Regarding the prosecutor's urge to "affirm" the victims, when put in context, it is clear the prosecutor was responding to defense counsel's argument that "all the prosecution's witnesses . . . I would argue to you has to have – there's some bias involved with it [sic]." Specifically, the prosecutor responded:

> Again, defense counsel asked about bias and he wants you to consider [the victims'] bias. Ladies and gentlemen, we submit to you that they have no bias. That's the whole point and they said the whole time they always got along. They got everything from this. They lose everything by coming to court. They lose it. But thankfully they're brave and honest enough young women to do what's right and we'd ask you to affirm their choices by finding this man guilty as charged.

Given that the prosecutor was responding directly to defense counsel's argument, the request to "affirm" the victims did not evoke broader issues than guilt or innocence. See *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Rather, the prosecutor was arguing that the victims should be affirmed because they were not biased witnesses. Thus, this comment was not improper.

Defendant next claims that the prosecutor improperly vouched for the victims' credibility. In raising this issue, defendant points to the prosecutor's arguments that "the People believe that these witnesses were truthful" and that the victims are "brave and honest women." Neither of these comments was improper. While it is improper for a prosecutor to "vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness," *Bahoda, supra* at 276, a prosecutor may argue from the facts issues of witness credibility, *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004).

Taken in context, the prosecutor did not attempt to sway the jury through some special knowledge of credibility, but rather argued that the evidence created the reasonable inference that the victims had no motive to be untruthful and were, therefore, believable. Specifically, the prosecutor recounted that the first victim explained that she got along well with defendant who was like a father figure to her and was not jealous when defendant was involved with other women after she became intimately involved with him because "he wasn't my man." The prosecutor also recounted to the jury that the second victim indicated that she loved defendant like a father. Therefore, the prosecutor did not improperly vouch for the witnesses' credibility.

Finally, defendant claims that the prosecutor improperly appealed to the jury's sympathy when she stated, in reference to defendant's sexual relationship with the first victim, "[W]ho knows how long this [sexual abuse] would have continued." This statement was not improper. Although a prosecutor may argue the evidence as well as all reasonable inferences arising from it as they relate to the case, *Bahoda, supra* at 282, a prosecutor may not "appeal to the jury to sympathize with the victim." *Watson, supra* at 591. Nonetheless, a prosecutor is not required to use the blandest possible terms when stating inferences from the evidence. *People v Fisher,* 449 Mich 441, 452; 537 NW2d 577 (1995).

In context, the prosecutor's question was not an attempt to evoke sympathy, but rather part of the prosecutor's argument to explain why the first victim delayed in reporting defendant's conduct. Specifically, the prosecutor argued the reasonable inference that the first victim may not have reported defendant's actions but for defendant's call to the second victim because the

first victim did not have a job, had run away from home, and was afraid. In light of these comments, the prosecutor was arguing reasonable inferences rather than appealing to juror sympathy.

Finally, none of the prosecutor's comments were outcome determinative. Not only did the prosecution's witnesses offer consistent incriminating testimony, but the trial court instructed the jury that it could only consider properly admitted evidence in reaching a verdict and the attorneys' arguments were not evidence. Given that juries are presumed to follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), these instructions would have eliminated any trace of prejudice from the prosecution's remarks. *Rodriguez*, *supra* at 30. Therefore, the prosecutor's remarks did not violate defendant's substantial rights.

Affirmed.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood